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16 *Attorney for Plaintiff Eric Davis And the Putative Class*

17 **UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

19 ERIC DAVIS, on behalf of himself  
20 and all others similarly situated,

21 Plaintiff,

22 vs.

24 AT&T SERVICES, INC.,

25 Defendant.

CASE NO. 15-cv-02342-DMS-DHB

26 **DECLARATION OF KIRA M. RUBEL  
IN SUPPORT OF PLAINTIFF'S  
MOTION TO AMEND THE  
SCHEDULING ORDER TO PERMIT  
THE FILING OF HIS FOURTH  
AMENDED COMPLAINT**

27 **Hearing Date:** October 14, 2016

**Hearing Time:** 1:30 p.m.

**Hearing Location:** Courtroom 13A  
333 West Broadway  
San Diego, CA 92101

**Judge:** Hon. Dana M. Sabraw

1 I, Kira Rubel, declare:

- 2
- 3 1. My name is Kira Rubel and I am counsel for Plaintiff Eric Davis and the  
4 putative class in the above captioned action. I make the following statements  
5 based upon my own personal knowledge and, if called to testify regarding the  
6 facts contained herein, can and would do so competently.
- 7 2. During the Rule 26f conference, I mentioned to the Court and counsel that I  
8 was concerned that an early amended pleading deadline could prejudice  
9 Plaintiff's case since there were numerous factual issues to sort through. As I  
10 recall, The Honorable Magistrate Judge Bartick responded that the Court  
11 would be rational in considering any motion by Plaintiff for leave to amend if  
12 the facts required it, or words of similar effect.
- 13 3. My co-counsel and I have been diligent in our continuous efforts to engage in  
14 discovery with Defendant. In fact, I sent out Plaintiff's Requests for  
15 Production, Set One, on December 31, 2015. I received Defendant's initial  
16 responses on March 18, 2016, due to various extensions. A true and correct  
17 copy of Defendant's responses to Set One is attached hereto at Exhibit D.
- 18 4. The bulk of the documents responsive to Set One were regarding calls to  
19 Plaintiff and the customer's account in which his number was transposed. In  
20 spite of receiving these records on March 18, we were not sure exactly how  
21 to read these documents, since they were incredibly hard to interpret with  
22 their various acronyms. Even though we could see in Plaintiff's records that  
23 he had indicated that Defendant was calling the "wrong number," we had no  
24 idea in what context this was said, what types of calls these were, etc.
- 25 5. We walked through the call records to Plaintiff with defense counsel, Hans  
26 Germann, by telephone and even he indicated that it would be best if one of  
27 Defendant's employees could go over the documents with us and interpret  
28 the short hand and different types of calls made to Plaintiff.
6. Taking Mr. Germann's cue, I sent Mr. Germann an email on March 28, 2016  
about the topics upon which I wished to depose one or more of Defendant's

- agents. Included in this topic list was a request to understand more about calls to “wrong numbers”.
7. Ultimately, the earliest Defendant could make anyone available was May and we settled on May 25 as the date to depose two individuals. Unfortunately, defense counsel was unable to make deponents available for all of my requested topics in the Rule 30(b)(6) notice, which is why we conducted subsequent depositions on June 28/29 on the remaining topics.
8. On April 1, 2016, I sent Plaintiff’s Special Interrogatories and Requests for Admission, Sets one, and Requests for Production, Set Two. This second set of document requests inquired, generally, into Defendant’s terms and conditions, scripts for outgoing calls, and recordings of calls with Plaintiff. A true and correct copy of Defendant’s responses to Set Two is attached hereto at Exhibit E.
9. I received the documents responsive to our Request for Production Set Two on May 18, 2016. This batch of documents contained the first reference to calls to “wrong numbers” in Defendant’s records that Plaintiff had seen – although it was in reference to the debt collection department exclusively.
10. The Rule 30(b)(6) depositions which took place on May 25, 2016 were of Joni Hixson and Michael Pederson. Mr. Pederson testified exclusively regarding the type of dialer used by Defendant and is not relevant to this motion. Ms. Hixson is the lead compliance person for ATT’s collection’s department and she testified regarding what happens when the debt collection department reaches a wrong number. In that instance, the collection agent is required to send a form email to a specific internal email address with the incorrect phone number included in the body of the email. This phone number is then circulated to all departments to be excluded from all other outgoing call lists, a process which takes approximately 30 days. This was the first time we realized that perhaps Defendant had a policy with respect to “wrong number” calls.

1       11.Following Ms. Hixson's deposition, I asked opposing counsel whether  
2 Plaintiff's phone number was ever included in one of these "wrong number  
3 emails" from the collection's department – defense counsel stated that it was  
4 not. Although we contend that these wrong numbers should be included in  
5 the class ultimately, since Plaintiff was not included in the emails, there was  
6 no basis to update the class definition at that time.

7       12.Based on Ms. Hixson's testimony, I composed Requests for Production Set  
8 Three, and asked for all outgoing call logs which indicated that Defendant  
9 had reached a wrong number. These requests were sent on June 3, 2016. A  
10 true and correct copy of Defendant's responses to Set Three is attached  
11 hereto at Exhibit F. These requests, numbers 29-32, ultimately were the  
12 source of the Parties' recent Joint Motion for Determination of Discovery  
13 Dispute.

14      13.During this early June time frame, we were in the process of arranging a time  
15 for further Rule 30(b)(6) depositions on the topics I had noticed in the first  
16 Rule 30(b)(6) notice. The earliest dates that Defendant could arrange with the  
17 appropriate people were on June 28 and 29, 2016 at AT&T's Atlanta,  
18 Georgia facility.

19      14.At the June depositions and, specifically, during the deposition of Grace  
20 Carter, we learned about Defendant's Proactive Churn Management Program  
21 ["PCM"], which is the department that calls customers in an effort to  
22 preemptively resolve account issues prior to service cancellation.

23      15.Ms. Carter testified that defendant kept records of PCM calls to "wrong  
24 numbers" in both their internal account notes and their vendors' databases of  
25 outgoing calls placed on Defendant's behalf, not just in the "wrong number  
26 emails" that Ms. Hixson had testified about. Ms. Carter also testified that it  
27 was the practice of this department to continue to call individuals who stated  
28 Defendant had reached a wrong number.

- 1       16.The account notes associated with calls to Plaintiff's cell phone show calls  
2       made by "proactive churn management". Although we didn't know  
3       specifically what this meant before the deposition of Ms. Carter, the  
4       combination of testimony by Ms. Carter and the Plaintiff's account notes  
5       show that Mr. Davis was one of the individuals who informed Defendant that  
6       they had reached the wrong number and who continued to receive subsequent  
7       calls regardless.
- 8       17.Thus, we believe that the PCM Department can identify calls to wrong  
9       numbers, such as those to Plaintiff, but we did not know this until the  
10      deposition of Ms. Carter revealed Defendant's unwritten policy to continue  
11      calling wrong numbers. This information could not have been obtained prior  
12      to Ms. Carter's deposition since she was only made available to Plaintiff in  
13      June and is the only deponent who possessed knowledge of Defendant's  
14      practices regarding wrong number calls within the PCM Department.
- 15      18.This will be our Fourth Amended Complaint. The first amendment was at  
16      Defendant's request to update the name of Defendant in the pleading. The  
17      motion for leave to file the second amendment was filed on April 15, 2016,  
18      the last day Plaintiff was permitted to file his motion for leave to amend per  
19      the Court's scheduling order, in order to add telemarketing allegations  
20      against Defendant. Finally, the Third Amended Complaint was filed on June  
21      9, 2016, at Defendant's request and stipulation, to add that Plaintiff had  
22      received two calls in a 12-month period, in order to avoid a motion to  
23      dismiss.
- 24      19.We did not have sufficient information on April 15, 2016 to amend the  
25      complaint to add this updated class definition or the supporting facts. Until  
26      the June deposition of Ms. Carter, we had little to no understanding of the  
27      PCM Program and certainly had no knowledge regarding that department's  
28      treatment of "wrong number" calls.

20. On September 1, 2016, I sent defense counsel, Mr. Germann, the proposed amended complaint for his review and stated our intent to move for leave to amend. On September 2, 2016, he indicated his client's intent to oppose our request. Mr. Germann and I also met and conferred telephonically on September 8, 2016 to fully discuss Plaintiff's motion and he reiterated his intent to oppose this motion.

I declare the foregoing is true under penalty of perjury and the laws of the United States of America on this 16th day of September, 2016.

## LAW OFFICES OF KIRA M. RUBEL

/s/ Kira M. Rubel  
KIRA M. RUBEL  
COUNSEL FOR LEAD PLAINTIFF, ERIC DAVIS.